DKLS SUNSHINE SDN BHD v. KERAJAAN NEGERI PULAU PINANG & ANOR

HIGH COURT MALAYA, PULAU PINANG
AZMI ABDULLAH JC
[JUDICIAL REVIEW NO: 25-27-07-2016]
17 JUNE 2017

ADMINISTRATIVE LAW: *Exercise of judicial functions – Judicial review – Application for – Preliminary objection raised – Whether application filed beyond time prescribed under O. 53 r. 3(6) of Rules of Court 2012 – Whether judicial review for an order of certiorari to set aside acquisition of land or against decision pertaining compensation – Whether issue of applicant exceeding prescribed time frame for filing judicial review could be raised by way of preliminary objection – Whether preliminary objection could be raised as this stage of proceedings – Whether there was legal impediment in law for such recourse being undertaken – Whether respondents barred and estopped from raising preliminary objection – Whether preliminary objection ought to be upheld – Whether judicial review ought to be dismissed in limine – Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor*

CIVIL PROCEDURE: *Preliminary objection – Issues raised – Application for judicial review – Whether application filed beyond time prescribed under O. 53 r. 3(6) of Rules of Court 2012 – Whether issue of applicant exceeding prescribed time frame for filing judicial review could be raised by way of preliminary objection – Whether preliminary objection could be raised as this stage of proceedings – Whether there was legal impediment in law for such recourse being undertaken – Whether respondents barred and estopped from raising preliminary objection – Whether preliminary objection ought to be upheld – Whether judicial review ought to be dismissed in limine – Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor*

The first respondent acquired three lots of lands under s. 8(1) of the Land Acquisition Act 1960 ('Acquisition Act') through Penang State Government Gazette ('the *Gazette*'). The respondents averred that Form E under s. 10 of the Acquisition Act notifying the landowners/representatives of the *Gazette* was served on 26 November 2014. On 14 April 2016, the second respondent arrived at a decision pertaining to the compensation to be paid to the applicant and the applicant being dissatisfied with the awards made filed a Form N under s. 38(1) of the same Act on 23 May 2016. In pursuant of this, the applicant filed an *ex parte* application for judicial review on 4 July 2016 with the order granting leave to pursue a judicial review being obtained from the High Court on 6 September 2016 and following that, on 13 September 2016 an application for judicial review for an order of *certiorari* to set aside the acquisition of the land was filed. The respondents raised a preliminary

objection on the basis that the judicial review was filed beyond the time prescribed under O. 53 r. 3(6) of the Rules of Court 2012. The respondents' argument was based primarily on the Federal Court decision of *Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor* ('*Kijal Resort Sdn Bhd*') which held that an application for judicial review made under O. 53 r. 3(6) of the Rules of the High Court 1980 challenging the decision of State Authority declaring that the land was to be acquired under the Acquisition Act must be filed within 40 days from the service of Form E (which was the notification of the *Gazette* issued on 17 April 2014 on the respondents). Thus, in this case, as Form E was served on the applicant on 26 November 2014, the filing of the *ex parte* application for judicial review was clearly against the provision prescribed and the decision of the Federal Court. The applicant, however, argued that the judicial review seeking an order for *certiorari* was made within time. It was the applicant's contention that the judicial review filed was against the order made by the second respondent on 14 April 2016, hence the applicant having filed the *ex parte* application for judicial review on 4 July 2016 definitely had not surpassed the prescribed time period for filing the application for judicial review. The applicant further argued that the issue of the applicant exceeding the prescribed time frame for filing this judicial review could not be raised by the respondents by way of a preliminary objection but instead should be pursued through a proper application. The issue that arose was whether the judicial review in this case was against the *Gazette* dated 17 April 2014 issued under s. 8 of the Acquisition Act with notification in Form E being delivered on the applicant on 26 November 2014 or the judicial review for *certiorari* being sought was against the decision of the second respondent made on 14 April 2016.

Held (upholding preliminary objection; dismissing application for judicial review):

(1) Upon reading of the statement of facts (encl.3) of this application for judicial review, para 3(a) clearly states that 'leave is to be granted to obtain an order for *certiorari* to set aside the Land Acquisition No. 70/2014 Government Gazette No. GN: 255/17.4.2014 for lots ...' Thus, this clearly reflected that the order for *certiorari* being sought under this judicial review application was against the *Gazette* dated 17 April 2014. The argument by the applicant that the judicial review was against the decision of the second respondent made on 14 April 2016 was contrary to their own statement of facts and was untenable and ill conceived. (para 10)

(2) Exhibit MCA2 were Forms H issued for the lots of land in question. Forms H clearly spelled out the purpose of the hearing under the heading 'Pemberitahu Pemberian Dan Tawaran Pampasan' in pursuant of the hearing conducted on 14 April 2016. Upon looking at these documents, this court was satisfied that the hearing on 14 April 2016 was to

determine the compensation to be awarded to the applicant and most certainly not against the acquisition of the land. Thus, this judicial review application could not be against the hearing on 14 April 2016; it was against the *Gazette* made on 17 April 2014. As the argument by the applicant was that this judicial review was against the decision made by the second respondent on 14 April 2016, this judicial review should be dismissed *in limine* for being defective in law and an abuse of process. (paras 11-15)

(3) The time prescribed for the filing of a judicial review has been amended and enlarged from 40 days under O. 53 r. 3(6) of the Rules of the High Court 1980 to three months under O. 53 r. 3(6) Rules of Court 2012. Services of Form E was effected on the landowners/representatives for all the lots on 26 November 2014. Given the fact that the *ex parte* application herein was only filed on 4 July 2016 (a lapse of almost 20 months later), the time frame of three months for the filing of a judicial review had long been surpassed, hence this judicial review should be dismissed *in limine*. (paras 17-20)

(4) The Federal Court in the case of *Kijal Resort Sdn Bhd* had decided that a preliminary objection on the issue of the time frame for filing of a judicial review being exceeded could be raised and accepted even at the Court of Appeal stage. Given this binding precedent, this court accepted the preliminary objection raised by the respondents in the matter before this court as there was no legal impediment in the law for such a recourse being undertaken by the respondents. The respondents in this judicial review were not barred and estopped from raising this preliminary objection at this stage of the proceedings. (paras 24-28)

(5) The service of the documents by the applicant on the Attorney General's Chambers before the leave application for judicial review was to satisfy the requirement of service and not in his capacity as the legal advisor to the Government. The respondents were not served with the documents for the leave stage of the judicial review and thus would not be in a position to raise any objection without being in possession of the relevant documents. The respondents' appearance at the *inter partes* proceeding was their first and earliest opportunity for them to appear and raise the preliminary objection. Thus, the respondents were definitely entitled to raise the preliminary objection. (para 28)

Case(s) referred to:

Chow Hong Lit lwn. YB Menteri Sumber Manusia, Malaysia & Satu Lagi [1998] 5 CLJ 169 HC ***(refd)***

Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor [2015] 3 CLJ 861 FC ***(foll)***

Legislation referred to:
Land Acquisition Act 1960, ss. 10, 38(1)
Rules of Court 2012, O. 53 rr. 3(2), (6), 8(1)

For the applicant - Ngeh Koo Ham; M/s Ngeh & Co
For the 2nd respondent - Anas Ahmad Zaki; State Legal Advisor, Pulau Pinang

Reported by Suhainah Wahiduddin

JUDGMENT

Azmi Abdullah JC:

Introduction

[1] The application for judicial review in this case was filed on 4 July 2016. On 9 March 2017, it was agreed by counsel appearing for the applicant and the Honourable State Legal Advisor representing the respondents that the preliminary objection raised by the respondents on the basis that the judicial review is filed beyond the time prescribed under O. 53 r. 3(6) of the Rules of Court 2012 should first be heard and decided by this court before proceeding with the substantive issues.

[2] The cause papers for the judicial review application are:

(a) Statement in accordance with O. 53 r. 3(2) of the Rules of Court 2012 (encl. 3)

(b) Afidavit sokongan affirmed on 9 September 2016 (encl. 6)

(c) Afidavit jawapan responden affirmed on 27 October 2016 (encl. 11)

(d) Afidavit balasan pemohon affirmed on 18 November 2016 (encl. 13)

(e) Afidavit jawapan kedua responden-responden affirmed on 27 December 2016 (encl. 15)

(f) Afidavit balasan ketiga pemohon affirmed on 9 January 2017 (encl. 16)

[3] This court having perused the written submissions of the applicant and the respondents, as well as further oral submissions decided on 10 April 2017 to uphold the preliminary objection raised hence dismissing the judicial review with costs. Dissatisfied with the finding of this court, the applicant has now filed an appeal to the Court of Appeal, hence, these grounds of judgment.

Preliminary Objection

[4] The respondents argue that this judicial review is against the acquiring of the three lots of lands by the first respondent under s. 8(1) of the Land Acquisition Act 1960 Land Acquisition No. 70/2014 through Penang State Government Gazette No. 255 dated 17 April 2014 ("the *Gazette*"). The

respondents aver that Form E under s. 10 of the Land Acquisition Act 1960 notifying the landowners/representatives of the *Gazette* was served on 26 November 2014.

[5] The respondents further submit that on 14 April 2016, the second respondent arrived at a decision pertaining to the compensation to be paid to the applicant and the applicant being dissatisfied with the awards made, filed a Form N (application for the objection to be referred to court) under s. 38(1) of the same Act on 23 May 2016.

[6] In pursuant of this, the applicant filed an *ex parte* application for judicial review on 4 July 2016 with the order granting leave to pursue a judicial review being obtained from the High Court on 6 September 2016 and following that, on 13 September 2016 an application for judicial review for an order of *certiorari* to set aside the acquisition of the land No. 70/2014 under Gazette No. 255/17.4.2014 was filed.

[7] The respondents' argument is based primarily on the Federal Court decision of *Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor* [2015] 3 CLJ 861 which held that an application for judicial review made under O. 53 r. 3(6) of the Rules of the High Court challenging the decision of State Authority declaring that the land is to be acquired under the Land Acquisition Act must be filed within 40 days from the service of Form E (which is the notification of the *Gazette* issued on 17 April 2014 on the respondents). Thus in this case, as Form E was served on the applicant on 26 November 2014, the filing of the *ex parte* application for judicial review on 4 July 2016 is clearly against the provision prescribed and the decision of the Federal Court.

[8] The applicant however strenuously argues that the judicial review seeking an order for *certiorari* is made within time. It is the applicant's contention that the judicial review filed is against the order made by the second respondent on 14 April 2016, hence, the applicant having filed the *ex parte* application for judicial review on 4 July 2016 definitely has not surpassed the prescribed time period for filing the application for judicial review.

Issue Considered

[9] This court, given the divergent viewpoints presented by the parties in this case has to decide whether the judicial review in this case is against the *Gazette* dated 17 April 2014 issued under s. 8 of the Land Acquisition Act 1960 with notification in Form E being delivered on the applicant on 26 November 2014 or the judicial review for *certiorari* being sought is against the decision of the second respondent made on 14 April 2016.

[10] Upon a reading of the statement of facts (encl. 3) of this application for judicial review filed by the applicant, para. 3(a) clearly states that "leave is to be granted to obtain an order for *certiorari* to set aside the Land Acquisition No. 70/2014 Government Gazette No. GN: 255/17.4.2014 for lots known as GM 486 Lot 1384, Title 38712 Lot 1385, Title 39320 Lot 1887 with all being in Mukim 11, Daerah Seberang Perai Selatan, Negeri Pulau Pinang". This court finds this has clearly reflected that the order for *certiorari* being sought under this judicial review application is against the *Gazette* dated 17 April 2014. The argument by the applicant that the judicial review is against the decision of the second respondent made on 14 April 2016 is contrary to their own statement of facts and is untenable and ill conceived.

[11] This court now turns its attention to afidavit jawapan responden affirmed on 27 December 2016 (encl. 15). Exhibit MCA2 are Forms H issued for the lots of land in question. The Forms H clearly spell out the purpose of the hearing under the heading "Pemberitahu Pemberian Dan Tawaran Pampasan" in pursuant of the hearing conducted on 14 April 2016. This court is satisfied even further upon looking at these documents that the hearing on 14 April 2016 was to determine the compensation to be awarded to the applicant and most certainly not against the acquisition of the land.

[12] Exhibit MCA4 of the same affidavit is a letter issued by the solicitors for the applicant and para. 3 of the letter states that the compensation offered in Form H is rejected and an objection under s. 38 of the Land Acquisition Act has been presented to the court on 24 May 2016. This goes to show that the hearing on 14 April 2016 was on the issue of compensation and not against the acquisition of the land. The relevant content of the letter dated 17 November 2016 is produced herein:

> Kami ingin memaklumkan pihak tuan bahawa anakguam kami tidak menerima tawaran pampasan seperti yang tercatat di Borang H di atas. Adalah seterusnya dimaklumkan bahawa anakguam kami telah pada 24.5.2016 memfailkan bantahan terhadap pengambilan tanah-tanah tersebut untuk dirujuk di Mahkamah Tinggi Pulau Pinang iaitu dalam tempoh 6 minggu dari tarikh Awad Pentadbir Tanah iaitu pada 14.4.2016 (menurut Seksyen 38(3)(a), Akta Pengambilan Tanah 1960).

[13] For the applicant's solicitors to now come to court and argue that this judicial review is against the acquisition of the land decided on 14 April 2016 is clearly a misconceived argument made to avoid the issue of time factor that the applicant has been caught in. The objection against the decision on 14 April 2016 would have to be by way of filing Form N to proceed with a land reference which the applicant's solicitors themselves have pursued as shown by exh. MCA4.

[14] Thus, this court finds that this judicial review application cannot be against the hearing on 14 April 2016 which was for compensation and would need to be pursued by way of land reference. This judicial review then can only be against the *Gazette* made on 17 April 2014.

[15] As the argument by the applicant's solicitors is that this judicial review is against the decision made by the second respondent on 14 April 2016, this judicial review should be dismissed *in limine* for being defective in law and an abuse of process.

Governing Principles

[16] In the Federal Court decision of *Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor* [2015] 3 CLJ 861 at p. 863 of the case, held (4) Ramly Ali FCJ stated:

> An application for leave for judicial review made under O. 53 r. 3(6) of the RHC challenging the decision of the State Authority declaring that the land is to be acquired under the LAA, must be filed within 40 days from the date when the decision was first communicated to the appellant ie, on the date when the notice of enquiry in Form E which appended a copy of the schedule in Form D was served in pursuant to s. 10 of the LAA on the registered proprietor or occupier of the land in pursuant to ss. 11, 52, 53 and 54 of the LAA. Herein Form E was served on the appellant on 7 March 2006. Application for leave for judicial review was filed on 6 January 2008 ie almost 22 months after the decision to acquire the land in question was first communicated to the appellant. This was clearly beyond the 40 days time frame as stipulated in O. 53 r. 3(6) of the RHC. There had been an inordinate delay on the part of the appellant in filing for judicial review. There was no indication to show that the appellant had applied for an extension of time. Thus the High Court had no jurisdiction to hear the appellant's application for judicial review on the ground that the time frame under O. 53 r. 3(6) had not been complied with. On this ground alone, the Respondent's first preliminary objection must be upheld and the judicial review application by the appellant ought to be dismissed *in limine*.

[17] It must first be noted however that the time period prescribed for the filing of a judicial review has been amended and enlarged from 40 days under O. 53 r. 3(6) of the Rules of the High Court 1980 which was used in the case of *Bukit Kijal Resort v. Pentadbir Tanah Kemaman & Anor* to three months under O. 53 r. 3(6) of the Rules of Court 2012.

[18] Reference is made to encl. 11 afidavit jawapan responden affirmed on 27 October 2016, exhs. MCA1(a) to (c) at item 7 that show service of Form E was effected on the landowners/representatives for all three lots on 26 November 2014 and the same is reproduced herein:

> Notis awam dalam Borang E di bawah Seksyen 10 Akta Pengambilan Tanah 1960 telah diserahkan kepada tuanpunya tanah/wakilnya pada: 26/11/2014.

[19] The applicant has not disputed in the three affidavits filed by them as well as the written submission filed and even during oral submissions that 26 November 2014 was the date that Form E was served on them, hence, this court finds and take cognisance that this really is the date that Form E was served on the applicant.

[20] Given the fact that the *ex parte* application in this case was only filed on 4 July 2016 (a lapse of almost 20 months later), the time frame of three months for the filing of a judicial review has long been surpassed, hence, this judicial review should be dismissed *in limine* since the case of *Kijal Resort Sdn Bhd* is definitely on all fours with the judicial review before this court.

[21] Aggravating the situation further for the applicant, there has been no application for enlargement of time filed to cure and remedy the dire predicament of the applicant.

[22] The applicant argues that the issue of the applicant exceeding the prescribed time frame for filing this judicial review cannot be raised by the respondents by way of a preliminary objection but instead should be pursued through a proper application. It is also their contention that the objection raised is out of time since leave has been obtained from the court for the judicial review. To augment their objection, it is also argued that this issue cannot be raised at this stage of the proceeding as it was never raised in the affidavits of the respondents.

[23] This court again finds guidance in the decision of the Federal Court in *Kijal Resort Sdn Bhd* at p. 864 held (6) which decides:

> The respondents were at liberty to raise the preliminary objection when the case came up for appeal at the Court of Appeal particularly when the High Court failed to consider their objections earlier. There was no legal impediment for that. The Court of Appeal was correct in hearing the preliminary objections and subsequently dismissing the appeal after allowing the objections.

[24] The Federal Court no less, has decided that a preliminary objection on the issue of the time frame for filing a judicial review being exceeded could be raised and accepted even at the Court of Appeal stage. Given this binding precedent, this court accepts the preliminary objection raised by the respondents in the matter before this court as there is no legal impediment in the law for such a recourse being undertaken by the respondents.

[25] It is also argued by the applicant's counsel that this issue of the judicial review being filed outside the time frame allowed by O. 53 r. 3(6) of the Rules of Court 2012 cannot now be challenged as there was no objection raised by the Attorney General at the leave stage though the documents were properly served by the applicant.

[26] This court does not concur with this argument as it was in held (5) at p. 864 of the precedent of *Kijal Resort Sdn Bhd* that:

> At the leave stage, the application was made by the appellant *ex parte*. Both the first and second respondents were not present in court as they were not served with all the relevant documents. Obviously, the respondents could not be expected to raise any preliminary objection at the leave stage. Therefore, the question as to whether the respondents were barred and estopped from raising such preliminary objections after leave had been granted did not arise. The first appearance by both the respondents in the application was when the application was heard *inter partes*. That was the first and earliest opportunity for them to appear and to raise the preliminary objections. There was nothing irregular about that.

[27] In *Chow Hong Lit lwn. YB Menteri Sumber Manusia, Malaysia & Satu Lagi* [1998] 5 CLJ 169; [1998] 3 MLJ 63 it was held pertaining to the role of the Attorney General's Chambers in accepting service of documents:

> Counsel for the applicant appeared to be confused about the position of the Attorney General as Attorney General under O. 53 r. 1(3) with that of the Attorney General as the legal adviser to the Government of Malaysia under art. 145(2) of the Federal Constitution. As the Attorney General under O. 53 r. 1(3), the applicant must give notice to the Attorney General on his action for leave to apply for the orders of *certiorari* and *mandamus*, and the applicant must at the same stage lodge copies of the statement and affidavit in the Attorney General's Chambers as required by r. 1(2). To achieve this purpose, the applicant had thus served the statement and affidavits in question on the Attorney General. Such service was not served on him as the legal adviser or as counsel representing the first respondent. Hence, after leave to apply for an O. 53 of the RHC had been granted, the applicant was thus obliged to serve on the first respondent - as a person directly involved in this proceeding - notice of the originating motion under 2(1) and the documents required under r. 3(1) through counsel from the Attorney General's Chamber.

[28] This court upon a careful study of the two precedents finds that the respondents in this judicial review are not barred and estopped from raising this preliminary objection at this stage of proceedings. The service of the documents by the applicant on the Attorney General's Chambers before the leave application for judicial review was to satisfy the requirement of service and not in his capacity as the legal adviser to the Government. The respondents were not served with the documents for the leave stage of the judicial review and thus would not be in the position to raise any objection without being in possession of the relevant documents. The respondents' appearance at the *inter partes* proceeding is their first and earliest opportunity for them to appear and raise the preliminary objection. Thus, in this instant case, the respondents are definitely entitled to raise the preliminary objection.

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Decision

[29] This court upon the deliberations made has decided to uphold the preliminary objection raised by the respondents pertaining to this judicial review, hence, this judicial review is dismissed with the agreed costs of RM5,000.

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